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justice where a receiver holds the property, would be unenforceable against the state, even assuming that the state would not take free from equities in such cases. See 12 HARV. L. REV. 558. In the case of a foreign corporation like the present, however, where no one has been appointed who can hold the legal title, justice can only be meted out by giving the property to the stockholders.

Whatever the common law doctrine may be, it had its origin in days of municipal and ecclesiastical corporations, when modern business corporations with stockholders were unknown. The rule has often been called both obsolete and odious. ANG. & A., CORP., 779 a. Considering, therefore, that the doctrine has never been affirmed in America, that it is wholly inapplicable to modern conditions, and that it has been doubted by almost every American text-writer, it seems not going too far to adopt a more liberal and just rule in its place. In a note to *In re Higginson and Dean* it is said, "The dissolved corporation was merely a legal name for the members of whom it consisted. The debts due to the corporation were therefore in substance, though not in form, debts due to these members. On the corporation being dissolved these debts may be considered to be in reality and in conscience the property of the persons who then constituted the corporation. But this natural justice cannot be expressed in any known terms of law or equity." 15 L. QUART. REV. 115. In other words, if the property goes to the state a mere technicality is to stand in the way of the rights of the stockholders, and this technicality is to be strictly applied in a branch of the law, which is full of anomalies, and which is constantly being moulded to meet new conditions. Modern corporate existence would be impossible without stockholders; the capital is furnished by them, and the property should "in reality and in conscience" belong to them when the corporation is dissolved, subject of course to the rights of creditors.

RECENT CASES.

BANKRUPTCY — AGREEMENT NOT TO PROSECUTE A DISPUTED CLAIM AS FRAUDULENT CONVEYANCE — TRUSTEE'S RIGHT TO THE CONSIDERATION. — An insolvent, who was contesting his father's will, agreed not to oppose the probate of the will, in consideration of the devisee's promise to convey part of the property to a daughter of the insolvent. The latter was afterwards adjudged a bankrupt. *Held*, that the daughter will be ordered to convey the property received by her to the trustee in bankruptcy. *Smith* v. *Patton*, 62 N. E. Rep. 794 (Ill., Sup. Ct.).

The statute of 13 Eliz. c. 5, concerning fraudulent conveyances, is in general merely declaratory of the common law, and the enumeration in the statute is by no means complete. BUMP, FRAUD. CONVEY., § 12. The principle would seem to include any sacrifice of an asset by which a debtor intentionally hinders any of his creditors in obtaining relief against the debtor's estate, under the circumstances which make an ordinary conveyance fraudulent. *Youngs* v. *Trustees of Public Schools*, 31 N. J. Eq. 290; see *Cadogan* v. *Kennett*, 2 Cowp. 432, 434. Moreover, where the consideration for the bankrupt's fraudulent act is the conveyance of property to a third person who is a volunteer, this property, since it is purchased by giving up a right in which the creditors had an interest, should be subject to a constructive trust for the creditors. *Whittlesey* v. *McMahon*, 10 Conn. 137; see *Coleman* v. *Cocke*, 6 Rand. (Va.) 618. In the principal case the bankrupt's agreement not to contest the will, being a defence to

any attachment of the testator's property as property belonging to the bankrupt, is within the principle above stated; and the elements necessary to constitute fraud appear to have been present. Therefore, under § 70 *e* of the Act of 1898, the trustee in bankruptcy seems entitled to recover.

BANKRUPTCY — EXECUTION SALE BEFORE PETITION FILED — VALIDITY OF TITLE. — § 67 *f* of the Bankruptcy Act of 1898 declares that all judgments obtained against an insolvent within four months prior to the filing of a petition in bankruptcy "shall be deemed null and void in case he is adjudged a bankrupt." *Held*, that a sale of realty on execution under a judgment obtained within the prescribed time will not be avoided at the suit of a prior fraudulent grantee of the same property, as the trustee in bankruptcy is the only person entitled to plead the nullity of the execution sale. *Hutchins* v. *Cantu*, 66 S. W. Rep. 138 (Tex., Civ. App.).

While the Bankruptcy Act gives the trustee a right to avoid the sale, the court regards the purchaser as having a perfect legal title until the trustee takes such action. On the same ground such a purchaser, without ever having been in possession of the land, has been allowed to maintain an action in ejectment. *Frazee* v. *Nelson*, 61 N. E. Rep. 40 (Mass.). In spite of the sweeping language of the act, these decisions seem sound, since no reason appears why the framers of the act should have intended any further operation. It does not follow that the purchaser at the execution sale possesses a "marketable title" sufficient, for example, to satisfy a decree for specific performance. Under the Act of 1867, § 14, all the previous judicial proceedings were annulled by the bankruptcy proceedings, unless the assignee waived his claim, and after a period of a dozen years or more, the assignee was allowed to take such property as assets of the estate. *In re Preston*, 6 N. B. R. 545; *Dushane* v. *Beall*, 161 U. S. 513. The right of the trustee under the present act to annul such an execution sale as that in the principal case, would seem to be equally extensive in time, and so long as it subsists, creates a serious cloud on the title; but the sale is valid as against any one but the trustee.

BILLS AND NOTES — ASSIGNMENT BY DELIVERY — PAYMENT TO LEGAL OWNER NOT IN POSSESSION. — The assignee of an unindorsed note surrendered it to the payee for purposes of renewal. The maker, knowing of this transaction, gave a renewal note to the order of the same payee, to whom he later paid the amount of the note in ignorance of the fact that it had been assigned by delivery to the former assignee and was then unindorsed in the latter's possession. *Held*, that the maker is still liable to the assignee. *Wangner* v. *Grimm*, 169 N. Y. 421.

As the court suggests, the mere fact that the payee received payment without producing the note might be considered sufficient to warn the defendant of possible rights in the possessor, so that the payment, though to the legal owner, would not discharge the defendant. This accords with the business view as to all classes of instruments in which rights are customarily given by delivery, that such delivery gives the assignee a security on which he can rely. See *Spencer* v. *Clarke*, 9 Ch. D. 137. This principle is properly applied to mortgage bonds. *Clinton Loan Assoc.* v. *Merritt*, 112 N. C. 243; *contra*, *Mutual Life Ins. Co.* v. *Hall*, 50 S. W. Rep. 254 (Ky.). It is generally ignored, unfortunately, in decisions as to bills and notes, and sometimes expressly disapproved. *Bury* v. *Hartman*, 4 S. & R. (Pa.) 175; but see *Bates* v. *Martin*, 3 Mo. 367. In the principal case, however, the court relied partly on the defendant's knowledge of the dealings with the old note as supplying constructive notice of the assignment of the new one. Doubtless if all parties intended the payee to take and keep the new note as trustee he could properly receive payment. *Boone* v. *Citizens' Savings Bank*, 84 N. Y. 83. In the absence of such an understanding, the defendant's knowledge of the previous dealings would go far to justify the decision, and, considered in connection with the principle first stated, seems conclusive. *Cf. Baldwin* v. *Billingsley*, 2 Vern. 539.

BILLS AND NOTES — USURY — FORFEITURE. — The plaintiff had paid to the defendant a usurious rate of interest and sued to recover the penalty provided for by § 5198 of the Revised Statutes of the United States. *Held*, that the plaintiff is entitled to recover twice the entire amount of interest paid. *First Nat. Bank* v. *Watt*, 22 Sup. Ct. Rep. 457.

Although the lower federal courts and many of the state courts have been called upon to determine whether the amount recoverable under this section is twice the entire amount of interest paid, or only twice the amount by which the usurious interest

exceeds what legally might have been collected, heretofore there has been no decision upon the point by the Supreme Court. The courts of two states have construed the statute as giving the smaller penalty only. *Hinterminster* v. *First Nat. Bank*, 62 N. Y. 212; *Bobo* v. *People's Nat. Bank*, 92 Tenn. 444. But such decisions place so severe a strain upon the language of the statute that it has been almost uniformly held that the larger penalty may be recovered. *Boemer* v. *Traders Nat. Bank*, 90 Texas 443; *Crocker* v. *First Nat. Bank*, 4 Dill. (U. S. Circ. Ct.) 358. This view is now conclusively established by the Supreme Court's decision in the principal case.

CONFLICT OF LAWS — FOREIGN JUDGMENTS — PROBATE OF WILL. — A will created trusts of personal property good by the law of Connecticut but too remote by the law of New York. The will was probated in Connecticut as the will of a citizen of that state. Subsequently the testator's widow, to defeat the trusts, sought to establish the will in New York as that of a citizen of New York. *Held*, that the testator's domicil at the time of his death was in New York, and that the will should be established there. *Plant* v. *Harrison*, 36 N. Y. Misc. 649 (N. Y., Sup. Ct., Sp. Term).

Every state in which a deceased person leaves personal property has jurisdiction to determine how that property shall pass. STORY, CONFL. LAWS, §§ 513–518. It is, however, general law that personal property may be transferred by a will valid by the law of the testator's domicil, and that jurisdiction to declare the will of a testator belongs to the state in which he was domiciled at the time of his death. *Desesbats* v. *Berquier*, 1 Binn. (Pa.) 336; *Succession of Gaines*, 45 La. Ann. 1237. That jurisdiction is *in rem*, and seems analogous to the jurisdiction in divorce cases over the *status* of the parties. *Cf.* 15 HARV. L. REV. 66. A judicial proceeding based on an invalid assumption of jurisdiction is not one to which, by the federal constitution, "full faith and credit" must be given. *Board of Pub. Works* v. *Columbia Coll.*, 17 Wall. (U. S.) 521; *Bell* v. *Bell*, 181 U. S. 175. Consequently when a will is probated in a state erroneously claiming jurisdiction on the ground of domicil, the decree of probate, so far as it assumes to declare the will, need not afterwards be respected by the courts of other states. *Overby* v. *Gordon*, 177 U. S. 214. Nevertheless a grant of letters of administration on the property within the state is valid, though the title is determined according to the decree of probate in that state, and effect is thereby given to the probate as to that property; for the subject-matter is within the jurisdiction of the court, and where there has been no previous probate of the will in another jurisdiction there can be no constitutional objection. See *Overby* v. *Gordon*, *supra*.

CONFLICT OF LAWS — FOREIGN JUDGMENT — SUBMISSION BY CONTRACT TO FOREIGN JURISDICTION. — By a clause in a contract made in Belgium, the defendant, an English subject not resident in Belgium, agreed that all disputes should be submitted to the jurisdiction of the Belgian courts. A dispute having arisen, the plaintiff brought action in Belgium, and the summons was sent by registered post to the defendant's address in England. By Belgian law such service was sufficient to give jurisdiction. Action was brought in England on the judgment obtained in Belgium. *Held*, that the defendant is bound by the judgment. *Feyericks* v. *Hubbard*, 18 T. L. R. 381 (Eng., K. B.).

According to the rule of the common law, a foreign judgment, though valid by the law of the court where it was obtained, cannot be enforced in the courts of another state, if it was obtained without personal jurisdiction over the defendant. *Schibsby* v. *Westenholz*, L. R. 6 Q. B. 155. Under what circumstances a court has jurisdiction by that rule is not clearly defined. It has, however, been decided that jurisdiction will be held to have existed if, at the time of the commencement of the suit in the foreign jurisdiction, the defendant was a subject or resident of the country; if he had come into the court as a plaintiff; or if he voluntarily appeared. *Douglas* v. *Forrest*, 4 Bing. 686; see *Schibsby* v. *Westenholz*, *supra*. Furthermore, in cases where none of these circumstances existed, but where the defendant had purchased stock in a foreign corporation under laws requiring submission to the foreign jurisdiction, a judgment of that jurisdiction has been held valid on the ground that the defendant had impliedly contracted to submit. *Bank of Australasia* v. *Nias*, 16 Q. B. 717; *Copin* v. *Adamson*, 1 Ex. D. 17. It would seem that, *a fortiori*, the result should be the same where the contract to submit is express; but only a *dictum* has been found to that effect. See *Rousillon* v. *Rousillon*, 14 Ch. D. 351, 371. A defect in a foreign judgment for want of personal jurisdiction can be set up only as an affirmative defence, and the defendant's contract is a good equitable answer to an attempt to set up that defence.

CONSTITUTIONAL LAW — CONFLICT OF LAWS — TORT ACTION FOR ACT DONE IN ANOTHER STATE. — The plaintiff, an Indiana citizen, was a servant of the defendant railway company, whose road ran through Indiana and Illinois. He was injured in Illinois through the negligence of a fellow-servant, for which, on the record, the company would not be liable in Illinois. He sued in Indiana under an Employer's Liability Act, relying on § 4, which provides that in a suit under the act for injuries occurring in another state, it shall not be competent for a railroad company to plead or prove the decisions or statutes of that other state. *Held*, that § 4 is unconstitutional as taking away a vested right of defence and therefore involving a deprivation of property without due process of law. *Baltimore, etc., Ry. Co.* v. *Read*, 62 N. E. Rep. 488 (Ind., Sup. Ct.).

As the statute in question was passed before any right of defence vested, the reason given for the court's decision is unsatisfactory; but the case may be supported on another ground. The American rule that the right to bring an action of tort depends on the *lex loci delicti*, has often been applied to cases of negligence by fellow-servants. *Ala. G. S. Ry. Co.* v. *Carroll*, 97 Ala. 126; *Louisville, etc., R. R. Co.* v. *Whitlow's Adm'r*, 43 S. W. Rep. 711 (Ky.). The attempt to abrogate this rule by legislation raises a question under the Fourteenth Amendment, under which the courts are inclined to group cases of objectionable extraterritorial legislation by a state. See *Pennoyer* v. *Neff*, 95 U. S. 714, 733. To attach liability to acts done in another state and entirely lawful there, would seem to be an excess of legislative jurisdiction, and therefore to fall short of the requirement of due process of law. The English rule, it is true, appears to be that if the act is not innocent or justifiable where committed, although not a tort there, the English law will govern tort liability in England. *Machado* v. *Fontes*, [1897] 2 Q. B. 231. But this doctrine, whether or not it would lead to an opposite result in the principal case, is difficult to support, and the American rule seems to have a basis of necessity in the sound principle that laws can have no extraterritorial effect.

CONTRACTS — PUBLIC POLICY — RELEASE OF MASTER FROM LIABILITY TO SERVANT'S NEXT OF KIN FOR NEGLIGENCE. — The next of kin of a railroad employee released to the company all right to damages which might accrue to him by the death of the employee through the company's negligence. *Held*, that the contract of release is void as against public policy. *Tarbell* v. *Rutland R. R. Co.*, 51 Atl. Rep. 6 (Vt.).

Where the contract is between the employee and the company, it has generally been held void in this country. *Lake Shore, etc., Ry. Co.* v. *Spangles*, 44 Oh. St. 471. The courts have gone on the ground that the employee, being at a disadvantage in contracting, should be protected, and that such contracts would tend to increase negligence on the part of the company. See note, 58 Am. Rep. 836. In two jurisdictions, however, these contracts have been enforced, in the absence of criminal or gross negligence, in order to allow the greatest possible freedom of contract in the disposal of services. *Griffiths* v. *Earl of Dudley*, 9 Q. B. D. 357; *Western & A. R. R. Co.* v. *Bishop*, 50 Ga. 465. Where the release is given by the next of kin of the employee the same arguments for holding it void seem applicable. Consequently, though the case is new, it will probably be generally followed.

COPYRIGHTS — ARTICLE IN ENCYCLOPÆDIA — WHO IS ENTITLED TO THE COPYRIGHT. — The defendants employed the plaintiff to act as editor of an encyclopædia, and also to contribute articles. The copyrights to these articles were registered in the plaintiff's name. The defendants afterwards published the articles in separate form. *Held*, that the plaintiff is entitled to an injunction and damages. *Aflalo* v. *Lawrence & Bullen*, [1902] 1 Ch. 264.

In both England and America, where one employs another to do literary work, the author is entitled to the copyright, unless the employment is on the terms, either express or implied, that the copyright shall belong to the employer. See *Hereford* v. *Griffin*, 16 Sim. 190; *Heine* v. *Appleton*, 4 Blatch. (U. S. Circ. Ct.) 125. In some cases the agreement may be inferred merely from the nature of the work and the kind of employment. *Lamb* v. *Evans*, [1893] 1 Ch. 218. It would seem that, in the absence of circumstances negativing such an agreement, it might be implied in the ordinary case of a magazine article, and perhaps an article in an encyclopædia, at least where the article is written by some one regularly employed to write for such periodical or encyclopædia; but there is apparently no American authority directly in point, and very little in England. See *Sweet* v. *Benning*, 16 C. B. 458. Each case, however, must stand on its own circumstances, and no hard and fast line can be drawn. If the principal case is sound the author can republish in separate form unless, in-

deed, as has been suggested by one text-writer, there is some principle by which he could be restrained for a reasonable time from nullifying his license to the publishers. See DRONE, COP., 259, 260.

CORPORATIONS — DISSOLUTION OF CORPORATION — SUCCESSION OF STOCKHOLDERS TO CORPORATE PROPERTY. — Upon the dissolution of a Louisiana corporation owning land in Texas, certain stockholders brought in the latter state an action of trespass to try title to the land there situated. *Held*, that the action is maintainable, since on the dissolution of the corporation the property passed to the stockholders as tenants in common. *Baldwin* v. *Johnson*, 65 S. W. Rep. 171 (Tex., Sup. Ct.). See NOTES, p. 743.

CRIMINAL LAW — PROCEDURE — DEMURRER TO EVIDENCE. — *Held*, that a demurrer to evidence is not a proper method of procedure in a criminal prosecution. *State* v. *Alderton*, 40 S. E. Rep. 350 (W. Va.). See NOTES, p. 738.

EQUITY — CONFLICTING EQUITIES — STATUTORY LIEN POSTPONED TO CLAIM OF HOLDER OF SECURED NOTE. — The maker of a note assigned to the payee as security a claim for payment under a building contract. The payee assigned the claim to X to hold for him and indorsed the note to a holder in due course. The payee of the note knew, but the indorsee did not, that the contractor's claim was subject to a statutory lien for the benefit of material-men. *Held*, that the proceeds of the contractor's claim should be used to pay the indorsee of the note in preference to the material-men. *Perry* v. *Parrott*, 67 Pac. Rep. 144 (Cal., Sup. Ct.). See NOTES, p. 742.

EQUITY — EXECUTORY CONTRACT FOR SALE OF LAND — PART TAKEN BY EMINENT DOMAIN — RECOVERY OF PURCHASE MONEY. — The defendant contracted to convey land to the plaintiff. After part of the price had been paid, but before the delivery of the deed, a fourth of the land was taken by right of eminent domain. *Held*, that the plaintiff is entitled to rescind the contract and recover the purchase money which he had paid. *Kares* v. *Covell*, 62 N. E. Rep. 244 (Mass.). See NOTES, p. 733.

EQUITY — INJUNCTION — COVENANT IN LEASE NOT TO ASSIGN. — The defendant was the assignee of a lease for a long term of years with a covenant against assignment without the lessor's consent. The lease, which was very advantageous for the lessor, had still many years to run. *Held*, that equity will enjoin a threatened breach of the covenant. *McEachern* v. *Colton*, [1902] A. C. 104 (P. C.).

It is often said that courts look with disfavor upon covenants in leases. TAYLOR, LANDLORD & TENANT, § 685. Whether this attitude be correct or not as regards actions at law, equity, being free to deal with each case with reference to its peculiar circumstances, should apply the same general equitable principles to covenants in leases as to other contracts. So, when a covenantee has adequate legal remedy, or will suffer no damage, or the agreement is of a kind not ordinarily enforceable in equity, relief is denied. *Johnstone* v. *Hall*, 2 K. & J. 414; *Hill* v. *Barclay*, 16 Ves. 402. Injunctions, however, have been freely given in cases of covenants limiting the manner in which leased premises may be used; and this even where a right of re-entry was reserved but would afford inadequate relief. *Fleming* v. *Snook*, 5 Beav. 252; *Stees* v. *Kranz*, 32 Minn. 313. Covenants against assignment are commonly accompanied by conditions for reëntry, which generally furnish adequate protection. This may explain why but two cases have been found, one denying, and one granting, the injunction. *Dyke* v. *Taylor*, 3 De G., F. & J. 467; *Cubitt* v. *Heyward*, 1 Seton 465. In the very similar case of a covenant not to sub-let, an American court granted an injunction. *Brolaskey* v. *Hood*, 6 Phila. (Pa.) 193. Altogether, the principal decision seems a satisfactory one, and will probably be followed.

EQUITY — SPECIFIC PERFORMANCE — INADEQUACY OF CONSIDERATION AS A BAR. — The defendant, in consideration of one dollar to him paid, agreed to lease land to the plaintiff for mining for oil and gas. The lease subsequently proved to be worth over two thousand dollars. *Held*, that mere inadequacy of consideration is a sufficient ground for refusing specific performance. *Federal Oil Co.* v. *Western Oil Co.*, 112 Fed. Rep. 373 (Circ. Ct., Ind.). See NOTES, p. 741.

EQUITY — TRADE LIBEL — RESTRAINING PUBLICATION BY INJUNCTION. The defendant, editor of a magazine, published fictitious letters containing false statements derogatory to the plaintiff's goods. *Held*, that a bill for an injunction, stating the above facts, is not demurrable. *Marlin Fire Arms Co.* v. *Shields*, 68 N. Y. App. Div. 88. See NOTES, p. 734.

INSURANCE — MUTUAL BENEFIT SOCIETIES — INSANITY AS EXCUSE FOR NON-COMPLIANCE WITH AMENDMENT TO BY-LAWS. — The by-laws of a mutual benefit society provided that the benefits payable on the decease of a member should go to his mother under certain circumstances. An amendment to the by-laws struck out this provision and required the member to designate the person to take under the same circumstances, forfeiture being the penalty of non-compliance. A member who had become insane before the amendment was passed, failed to designate any one. Upon his death his mother, who would have taken under the former by-law, brought suit. *Held*, that the amendment and the non-compliance of the insane member afford no ground of defence. *Grossmayer* v. *District No. 1, etc.*, 22 N. Y. L. J. 2229 (N. Y., App. Div.).

The contract of insurance in mutual societies includes in its terms the charter and by-laws of the organization. See *Mitchell* v. *Lycoming, etc., Co.*, 51 Pa. St. 402. It is also generally held to include subsequent amendments to the by-laws, if reasonable. *Supreme Commandery, etc.*, v. *Ainsworth*, 71 Ala. 436; *Allnutt* v. *Subsidiary High Court, etc.*, 62 Mich. 110. But it is argued that where, as in the principal case, an amendment is confessedly reasonable, it must apply to all members alike. This seems not to be a sound contention. Although compliance with reasonable amendments is in general obligatory upon all members, non-compliance should not be ground for forfeiture until opportunity has been given for compliance. Accordingly, forfeiture was not allowed where no notice of an amendment was received, nor where the acts required were, as to a particular member, impossible. *Thibert* v. *Supreme Lodge, etc.*, 78 Minn. 448; *Wist* v. *Grand Lodge, etc.*, 22 Or. 271. On the other hand, it would seem that where an amendment requires acts that could be done equally well by a guardian, non-compliance after notice to the guardian should not be excused. This is perhaps the proper ground on which to rest a decision holding insanity no excuse for non-payment of premiums, as in *Wheeler* v. *Connecticut, etc., Co.*, 82 N. Y. 543. In the principal case, as the act in question required an exercise of personal choice, a guardian could not well be substituted, and the court's solution seems the correct one. See also *Hoeffner* v. *Grand Lodge, etc.*, 41 Mo. App. 359; *Supreme Lodge, etc.*, v. *Zuhlke*, 129 Ill. 298.

INSURANCE — PERSONS — FALSE WARRANTIES BY AN INFANT. — *Held*, that a breach of a warranty in an insurance policy does not avoid the policy when the insured is an infant. *O'Rourke* v. *John Hancock, etc., Ins. Co.*, 50 Atl. Rep. 834 (R. I.). See NOTES, p. 739.

MORTGAGE — MERGER — EXTINCTION OF MORTGAGE DEBT. — The plaintiff, having acquired an estate subject to a mortgage, bought in the note and the mortgage securing it. He then sued upon the note. *Held*, that the equity of redemption merged with the legal estate and that the debt was extinguished by the merger. *Hester* v. *Frary*, 17 Chic. L. J. 45 (Ill., App. Ct.). See NOTES, p. 740.

MUNICIPAL CORPORATIONS — NEGLIGENCE IN ENFORCING ORDINANCE — COMMON LAW LIABILITY. — A city, after passing an ordinance prohibiting fast bicycle riding on the streets, negligently failed to enforce it. The plaintiff was injured by one violating the ordinance. *Held*, that the city is liable for the injury sustained. *Mayor, etc.*, v. *Klotz*, 49 Atl. Rep. 836 (Md.). See NOTES, p. 736.

MUNICIPAL CORPORATIONS — TAXES — ESTOPPEL. — The plaintiff sued to enjoin the collection of taxes upon his property. The taxes had not been paid, but before the plaintiff purchased the property he consulted the tax records of the city and found an entry of "paid" as to the taxes in question. *Held*, that the city is not estopped to show that the taxes were not paid. *Philadelphia Mortgage, etc., Co.* v. *Omaha*, 88 N. W. Rep. 523 (Neb.). See NOTES, p. 737.

PERSONS — INFANTS' CONVEYANCES — TIME OF DISAFFIRMANCE. — *Held*, that when an infant has made a conveyance of her realty, the right of disaffirmance which

arises on her coming of age may be exercised at any time within the period of the Statute of Limitations thereafter. *Shipp* v. *McKee*, 31 So. Rep. 197 (Miss.).

Express assent, or any deliberate act or forbearance by which the infant, after reaching full age, takes or retains a benefit from the transaction or knowingly suffers the other party to make expenditures on the land, is generally held to be an affirmance of the conveyance. *Irving* v. *Irving*, 9 Wall. (U. S.) 617; *McCormic* v. *Leggett*, 8 Jones L. (N. C.) 425. Where, however, there is no such conduct, but only a failure to exercise the privilege of avoidance, the weight of authority seems to incline toward the rule in the principal case. *Sims* v. *Everhardt*, 102 U. S. 300. It is submitted, however, that the aim of the law to protect the infant against his own imprudence is sufficiently attained by giving him a reasonable time to disaffirm after coming of age. A reasonable time may be longer in the case of conveyances than in that of contracts, but it would seem unnecessary to extend it to the full statutory period. Such an extension must result in great insecurity of title and frequent hardship to the other party, while affording a quite unnecessary amount of protection to the grantor. This view is supported by a strong line of authorities. *Goodnow* v. *Empire L. Co.*, 31 Minn. 463; *Hastings* v. *Dollarhide*, 24 Cal. 195. The legislative tendency is in the same direction. See STIMSON, AM. STAT. LAW, § 6602.

PROPERTY — COVENANT NOT TO ASSIGN A LEASE WITHOUT CONSENT OF LESSOR — REASSIGNMENT TO ORIGINAL LESSEE. — A lessee covenanted not to assign without the lessor's consent. The latter afterward consented to an assignment. *Held*, that a reassignment to the original lessee without consent is a suable breach of the covenant. *McEacharn* v. *Colton*, [1902] A. C. 104 (P. C.).

Where a lease contains a condition against assignment without consent, an alienation with consent determines the condition, so that no future alienation gives the lessor a right of entry. *Dumpor's Case*, 4 Co. 119 b. But a covenant to the same effect runs with the land, and the lessor can sue an assignee for breach of it. *Williams* v. *Earle*, L. R. 3 Q. B. 739; see *Paul* v. *Nurse*, 8 B. & C. 486, 487. Consequently the assignee would seem to be liable even for a reassignment to the original lessee without consent of the lessor. In the only case found on the point, however, the court considered that the lessor by making the lease consented to have the lessee as a tenant for the full term, and that such a covenant by its true construction did not require a new and special consent for a reassignment to the original lessee. *McCormick* v. *Stowell*, 138 Mass. 431. But properly construed, consent in such a case would seem to mean an act rather than a mere state of willingness, and can hardly be implied from a transaction happening before the idea of a reassignment would naturally occur to either party.

PROPERTY — DEEDS — RECORDING AS AMOUNTING TO DELIVERY. — *Held*, that the recording of a deed amounts *prima facie* to a delivery. *Lay* v. *Lay*, 66 S. W. Rep. 371 (Ky.).

This appears to be the first decision in Kentucky on the point in question. According to what seems the better view the act of delivery may be completed without the assent or knowledge of the grantee, the sole test of delivery being the grantor's intent to divest himself completely of title. See *Mitchell* v. *Ryan*, 3 Oh. St. 377; 14 HARV. L. REV. 456. Registry offices are intended for recording real transactions, so it might be regarded as sanctioning an abuse of the system to allow a man who has recorded a document, by which he purports to grant land, to say that he did not intend to give the instrument effect. Recording by the grantor, therefore, should be at least *prima facie* evidence of delivery, and might well be regarded as conclusive. In one state, however, there seems to be no rule making the mere act of recording even *prima facie* evidence. *Egan* v. *Horrigan*, 51 Atl. Rep. 247 (Me.). But the principal case is supported by the weight of modern authority. *Lawrence* v. *Farley*, 24 Hun (N. Y.) 293.

PROPERTY — GIFT CAUSA MORTIS — CONSTRUCTIVE DELIVERY. — A depositor, in expectation of death, delivered to her niece the key of a trunk containing a savings bank book, intending thereby to give the deposit to the niece. The trunk also contained other property, including several pass-books. The niece thus obtained possession of the book, though this was never known to the depositor. *Held*, that the delivery is not sufficient to establish a gift *causa mortis*. *Dunn* v. *Houghton*, 51 Atl. Rep. 71 (N. J., Ch.).

Delivery of a key is usually held sufficient to complete a gift of the entire property to which it gives access. *Marsh* v. *Fuller*, 18 N. H. 360. The majority of cases

make no distinction when only part of the property is given. *Devol* v. *Dye*, 123 Ind. 321. The principal case went largely on the ground that delivery of the key could not be considered a symbolical delivery of part of the property to the exclusion of the rest. It would seem, however, that such delivery is not properly termed symbolical. See *Coleman* v. *Porter*, 114 Mass. 30, 33. Its importance lies in the fact that by it the recipient acquires the power of control and therefore constructive possession; the key is the means of obtaining actual possession and not merely a symbol. See *Ward* v. *Turner*, 2 Ves. Sen. 431, 442; POLL. & WRIGHT, POSS., 61 *et seq.* In this respect such delivery is like attornment by a bailee, and both, inasmuch as they carry with them power to control, are forms of constructive delivery, not of the narrower delivery by symbol. See *Elmore* v. *Stone*, 1 Taunt. 458. Apparently, then, the better view would have supported the gift *causa mortis* in the principal case.

PROPERTY — GIFT INTER VIVOS OF SAVINGS BANK ACCOUNT — RETENTION OF PASS-BOOK. — A depositor withdrew her account from a savings bank, and reëntered it payable to herself or niece. Both signed their names as depositors, the original depositor retaining possession of the pass-book. Her donative purpose was established. *Held*, that this transaction constituted a valid gift *inter vivos*. *Dunn* v. *Houghton*, 51 Atl. Rep. 71 (N. J., Ch.).

The courts hesitate to hold such joint deposits valid as gifts when the alleged donor retains possession of the pass-book. *Marshal* v. *Crutwell*, L. R. 20 Eq. 328. It is, indeed, held in some jurisdictions that the gift is never complete until all control is resigned by the donor. *Dougherty* v. *Moore*, 71 Md. 248. Such cases, however, seem to overlook the ground adopted in the principal case, that entering of the name of the donee as a joint depositor supplies the place of a delivery by creating a contractual relation between the bank and the new depositor, which the donor cannot directly extinguish. *Cf. Kerrigan* v. *Rautigan*, 43 Conn. 17. It is true that he has the power, so long as he retains possession of the pass-book, to do so indirectly by drawing out the entire deposit, but this can be done by any joint depositor. See *McElroy* v. *Albany Savings Bank*, 8 N. Y. App. Div. 46. The transaction is enough to give the survivor of the joint depositors absolute rights over the account to the exclusion of the personal representative of the deceased. *Mulcahey* v. *Emigrant Savings Bank*, 62 How. Pr. (N. Y.) 463. The better view, then, seems to be that mere retention of the pass-book will not defeat the gift. *McElroy* v. *Albany Savings Bank*, *supra*; *Estate of Griffiths*, 1 Lack. Leg. News 311.

PROPERTY — SURFACE WATER — DISCHARGE IN A STREAM ON THE HIGHWAY. — The defendant erected a retaining wall to support a building. To allow the escape of surface water, an opening was made in the wall, in which a six-inch pipe was inserted. Ice formed on the highway from water discharged through the opening; and the plaintiff, without negligence, slipped on the ice, sustaining personal injuries. *Held*, that this diversion of the surface water is not actionable. *Jessup* v. *Bamford, etc., Co.*, 51 Atl. Rep. 147 (N. J. C. A.).

The law of surface water is largely arbitrary, and not governed by satisfactory principles. See 14 HARV. L. REV. 390. In general, a proprietor may improve his land, regardless of the resulting obstruction or diversion of surface water. *Bowlsly* v. *Speer*, 31 N. J. Law 351. But this right does not extend to such changes as will cast the water upon adjoining land in an artificial stream. *Field* v. *West Orange*, 36 N. J. Eq. 118; *Bates* v. *Westborough*, 151 Mass. 174. The action in surface water cases is usually for damage to land; but the same rules should apply to the discharge of water upon a highway, and if through a violation of these rules the highway is made dangerous to travellers, an action should lie for personal injuries resulting. The principal case seems to be on debatable ground between the two rules above noted; hence the court was divided. The minority supported a literal enforcement of the restricting rule. The majority, however, recognizing both rules, seem inclined to apply the principle of reasonable user in a doubtful case. In another jurisdiction reasonableness has been made the test for all cases. See *Willitts* v. *Chicago, etc., Ry. Co.*, 88 Ia. 281. The application of such a docrine to the law of surface waters would be desirable; but reasonable user involves a question of fact, and the court, if ready to adopt that test, should have left the question to a jury.

SALES — DELIVERY — PASSING OF TITLE AS AGAINST THIRD PERSONS. — A mortgagor, in part discharge of the mortgage debt, sent a flock of sheep to a place agreed upon for delivery. A large number of the sheep having become separated from the

flock on the journey, delivery was made of the remainder to the mortgagee's vendee, who paid the mortgagee for the number actually received. The mortgagee at once instituted search for the missing sheep. Before they were found by him, but after the delivery of the main flock, they were attached by a creditor of the mortgagor. There was no fraud imputed as to any part of the transaction. *Held*, that the mortgagee is entitled as against the creditor. *Kinney & Co.* v. *First, etc., Bank*, 67 Pac. Rep. 471 (Wy.).

This result must be reached upon one of two wholly independent grounds not properly distinguished by the court. Delivery of part of the flock to the sub-vendee must be held a good delivery of the remainder, or else delivery must be held unessential as against the attaching creditor. If delivery is essential it is generally conceded that delivery of part as of the whole satisfies the requirement. *Hobbs* v. *Carr*, 127 Mass. 532. But in the principal case the partial delivery was not accepted as constructively a delivery of the whole. In so far, therefore, as the court relies upon a delivery the case seems unsound. The result may, however, be validly reached upon the other view considered by the court, that delivery will not be required where a vendee has used due diligence in acquiring possession. This view is supported by recognized authority. *Meade* v. *Smith*, 16 Conn. 346; *Walden* v. *Murdock*, 23 Cal. 540. It is opposed, however, to authority of perhaps equal weight. *Lanfear* v. *Sumner*, 17 Mass. 110. The result of the decision, thus considered, seems to be in effect to place Wyoming among the jurisdictions that follow the doctrine of *Meade* v. *Smith*, *supra*. See also *State, etc.*, v. *Hellman*, 20 Mo. App. 304; but *cf. Morgan* v. *Taylor*, 32 Tex. 363.

TORTS — RES JUDICATA — DAMAGES TO PERSON AND PROPERTY FROM ONE WRONGFUL ACT. — The plaintiff's wagon collided with a gravel-heap negligently left by the defendant. The plaintiff began one action for damages to his vehicle and another for personal damages. In the former action he was successful. *Held*, that he may notwithstanding recover in the second action. *Reilly* v. *Sicilian Asphalt Paving Co.*, 170 N. Y. 40.

Public policy requires that one cause of action be not twice sued on. 2 BLACK, JUDGMENTS, § 725. Therefore no recovery may be had for later accruing damages. *Fetter* v. *Beal*, 1 Ld. Raym. 339. Nor can two suits be brought for one wrongful act injuring two similar rights of the plaintiff. *Knowlton* v. *New York, etc., R. R. Co.*, 147 Mass. 606; *cf. Missouri Pac. Ry. Co.* v. *Scammon*, 41 Kan. 521. When, as in the principal case, one wrongful act damages person and property, although two dissimilar rights are injured, probably in most jurisdictions recovery for both injuries may be had in a single action. *Cf. Howe* v. *Peckham*, 10 Barb. (N. Y.) 656. If a single action suffices, the reasons of expediency preventing two suits for damages of one kind ought ordinarily, to prevent two suits when the damages are of different kinds. *King* v. *Chicago, etc. Ry. Co.*, 80 Minn. 83; *contra, Brunsden* v. *Humphrey*, 14 Q. B. D. 141; *cf. Doran* v. *Cohen*, 147 Mass. 342. Yet because a claim for personal damages is commonly not assignable, while one for damages to property is, and because the statutes of limitations for the claims may differ, it is sometimes convenient to keep the claims separate. See 15 HARV. L. REV. 229. In such cases, if necessary, two actions might properly be allowed; but this should be only for special reasons, which do not seem to have been present in the principal case.

TRUSTS — CONSTRUCTIVE TRUSTS — CONVEYANCE OF LAND ON GRANTEE'S PROMISE TO PAY MONEY TO THIRD PERSON. — One J., being in his last illness and desiring to distribute his property, two months before his death conveyed certain land to his wife, the defendant, on her express oral promise to pay a specified sum to his grandchild, the plaintiff. The defendant had no other property. *Held*, that equity will declare the defendant a trustee *ex maleficio* and compel her to turn over the promised sum to the plaintiff. *Ahrens* v. *Jones*, 169 N. Y. 555.

Owing to the unfortunate limitation in New York of the sole beneficiary doctrine held in most of the states, the plaintiff could not recover on the contract. *Durnherr* v. *Rau*, 135 N. Y. 219. The court, wishing to work out the plaintiff's rights, relied on the rule established in the somewhat analogous cases of wills. A devisee of land on an oral trust, unenforceable under the Statute of Frauds, is held a constructive trustee for the intended beneficiary. *Trustees of Amherst College* v. *Ritch*, 151 N. Y. 282. In the principal case, however, the grantor apparently did not intend to create a trust. The defendant incurred a contractual obligation unconnected with her ownership of the land. Moreover, the principle relied on has not been generally ex-

tended to cover conveyances *inter vivos*. *Campbell* v. *Brown*, 129 Mass. 23; but see *Goldsmith* v. *Goldsmith*, 145 N. Y. 313; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 296. If, however, the defendant, when she obtained the deed, intended not to perform, she by fraud prevented the plaintiff from acquiring property and unjustly enriched herself, and equity, though not constituting the defendant a trustee, might perhaps give specific reparation for the tort. If the defendant took the conveyance in good faith and later changed her intention, it is difficult to see any remedy for the plaintiff consistent with the New York sole beneficiary doctrine.

TRUSTS — EQUITABLE ATTACHMENT OF TRUSTEES' RIGHT OF EXONERATION — DEFAULT OF ONE TRUSTEE. — Three trustees jointly carried on a business, and in the legitimate conduct thereof incurred certain debts. One of the trustees proved a defaulter, but the other two had clear accounts. The creditors demand the right to come against the trust fund for the amount of their claims, by applying to the payment of their claims the right of exoneration of the non-defaulting trustees. *Held*, that they may do so. *In re Frith*, [1902] 1 Ch. 342.

For whatever debts the trustees incur in the legitimate course of business, they have a right not only to indemnify themselves from the trust fund, but even to draw on it directly to meet such claims. *Gosborne* v. *Charter Oak Life Ins. Co.*, 142 U. S. 326; *Dowse* v. *Gorton*, [1891] A. C. 190. This right, as an existing asset, the creditors of the business may reach in equity. See *Ex parte Garland*, 10 Ves. 110. But their right is no greater than that of their debtor, so where there is but a single trustee and he defaults, since his right is gone, there is no asset which the creditor can reach. *In re Johnson*, 15 Ch. D. 548. In the principal case, however, the default of one trustee did not affect the right of the two non-defaulting trustees to exoneration. Although it might be said that their ultimate loss could be only their share of the debt, since they could get contribution from the defaulter, still the debt being joint, they could be forced originally to pay it all. To meet this liability they would be entitled to draw upon the trust fund. It seems entirely in accord with the general principle then, that the creditors should get the benefit of this right.

TRUSTS — LIABILITY OF TRUSTEE DEALING WITH THE RES. — A trustee kept the trust funds in a separate account at a London bank. As he lived in the country, his solicitors had the pass-book and check-book, and when payments were to be made on account of the trust estate, sent checks for signature to the trustee with explanatory letters. A clerk of the solicitors, by a forged telegram and letter purporting to come from them, induced the trustee to sign certain checks drawn to bearer, with the proceeds of which the clerk absconded. *Held*, that the trustee is not liable to the beneficiary for this sum. *Re Smith*, 46 Sol. J. 358 (Eng., Ch. D.).

If it can be deduced from the facts that the trustee delegated to agents the duty of managing the trust estate, the trustee would be liable for any unlawful dealing by those agents or their servants. See *Re Speight*, 22 Ch. D. 727, 756; *Learoyd* v. *Whiteley*, 12 App. Cas. 727, 733. The principal case may, however, be criticised on a broader ground. In the management of a trust estate the trustee ordinarily need use only such care as a reasonably prudent man would use in the management of his own property. *Learoyd* v. *Whiteley*, *supra*. This principle is subject to limitations. It applies very generally to acts done in respect to the custody, conversion, or investment of trust property. See *Speight* v. *Gaunt*, 9 App. Cas. 1. When, however, the trustee undertakes to pay out from the trust fund to the *cestui* or to creditors, he is held to a stricter accountability. *Bostock* v. *Floyer*, L. R. 1 Eq. 26; *Rowland* v. *Witherden*, 3 Mac. & G. 568. Thus, a trustee has been held liable where, deceived by a forgery, he has paid money to the wrong person. *Eaves* v. *Hickson*, 30 Beav. 136; *Cutler* v. *Boyd*, 60 L. T. N. S. 859. It is difficult to distinguish these cases from the principal case, and a decision against the trustee here would seem to accord better with the general principles governing the liability of those who have charge of the property of others and undertake to deal with it.

TRUSTS — TRUST VOID UNDER STATUTE OF FRAUDS — TRUST RESULTING FROM PAYMENT OF CONSIDERATION. — M purchased land, causing the legal title to be conveyed to B, though without the latter's knowledge. M intended thereby to benefit X, but no trust valid under the Statute of Frauds was declared. B, upon learning of the conveyance, refused to hold for X and claimed complete rights in the land. M brought a bill against B for conveyance to herself. *Held*, that B must convey, there being a resulting trust for M. *In re Davis*, 112 Fed. Rep. 129 (Dist. Ct., Mass.)

The final decision does not seem open to question. *Cf. Easterbrooks* v. *Tillinghast* 5 Gray (Mass.) 17. The common error was made, however, of confusing this with the ordinary case where property is conveyed to one person and consideration paid by another. In such cases, a resulting trust is presumed from the supposed intention of the parties, as a resulting use formerly was from a feoffment without consideration. *Powell* v. *Munson, etc., Co.*, 3 Mason (U. S. Circ. Ct.) 347, 361; *White* v. *Carpenter*, 2 Paige Ch. (N. Y.) 217, 238. See *Dyer* v. *Dyer*, 2 Cox 92, 93. But this presumption is rebuttable and in the principal case it appeared clearly that no trust for A was originally intended. The case belongs to that class in which the trust is raised entirely from the court's sense of justice, without reference to the intention of the grantor. *Cf. Lord North* v. *Purdon*, 2 Ves. Sen. 494. The grounds are the same as those upon which a trust arises in favor of a grantor whose conveyance was procured by fraud. *Long* v. *Fox*, 100 Ill. 43. It follows that in jurisdictions where a willing trustee is allowed to carry out a trust insufficiently declared, the rights of the parties in cases like the principal case would not be determined until the trustee indicates his position. Even where failure to observe the distinction would have no important practical results, it should not, in the interests of clear reasoning, be overlooked.

WILLS — REVOCATION — PRESUMPTION FROM MUTILATION. — A will presented for probate showed that the signatures of the testatrix and witnesses had been cut off, and then reaffixed with paste. There was no evidence as to who did the cutting, nor when it was done. *Held*, that these facts raise no presumption for or against the validity of the will. *Webster* v. *Yorty*, 62 N. E. Rep. 907 (Ill., Sup. Ct.).

The authorities cited by the court are not exactly in point, holding merely that when an alteration appears in an instrument, it is a question of fact, unaffected by any presumption, whether the change was made before or after execution. *Reed* v. *Kemp*, 16 Ill. 445. In the principal case there are two questions: first, whether the cutting was done by the testator, and second, with what intent it was done. On the first question it seems proper to hold that there is no presumption. But if the cutting is found to have been done by the testator, the English courts have presumed an intent to revoke. *Bell* v. *Fothergill*, L. R. 2 P. & D. 148. In America, although no case precisely in point has been found, there is a similar presumption in the analogous case of a missing will which, when last known to have been in existence, was in the possession of the testator, and the absence of which cannot be accounted for. *Collyer* v. *Collyer*, 110 N. Y. 481. In so far then, as the court says that there can be no presumption at all in the principal case, the ruling seems inaccurate.

WILLS — REVOCATION BY RATIFYING PREVIOUS MUTILATION. — In a contest as to the validity of a will, which had been much mutilated by vermin in the testator's lifetime, it appeared that the testator had considered the mutilation as invalidating the will. *Held*, that if the testator orally ratified the defacement by the vermin, he thereby revoked the will. *Cutler* v. *Cutler*, 40 S. E. Rep. 689 (N. C.).

In general, the statutes regulating wills provide that a revocation may be effected by certains forms of mutilation by the testator, or by another at his direction and in his presence, provided there is the requisite intent. Having established definite requirements, these statutes impliedly exclude all others. *Runkel* v. *Gates*, 11 Ind. 95. The precise point of the principal case seems never before to have been decided. Nevertheless, it has been thought that by adopting the loss or destruction of his will, a testator might revoke it. See *Steele* v. *Price*, 5 B. Mon. (Ky.) 58; UNDERHILL, WILLS, 308; but see *contra*, *Mills* v. *Millward*, 15 P. D. 20. On the other hand, the destruction of a will by the testator's direction has been held nugatory because not done in his presence. *Dower* v. *Seeds*, 28 W. Va. 113. It will occasionally be unfortunate if a testator may not orally ratify the mutilation or destruction of his will; yet such ratification does not fulfil the requirements of the statutes, that the necessary intention concur with the revoking act, and that the destruction be in the testator's presence. The adequate protection of testamentary dispositions of property seems to demand a strict construction of the statutes. A contrary decision in the principal case, therefore, would seem more in harmony with the objects of such legislation.